



**MEMORANDUM**

March 18, 2016

**To:** The Honorable Jared Huffman  
Attention: Ben Miller

**From:** Betsy A. Cody, Specialist in Natural Resources Policy, [REDACTED]

**Subject:** Westlands Drainage Settlement, H.R. 4366, and “Key Concepts” Identified by DOI

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This memorandum responds to your request for a comparison of “key elements” identified by the Obama Administration in developing a balanced approach to resolving legal obligations of the United States in providing drainage service to the Westlands Water District in California with provisions of the September 15, 2015 Westlands drainage settlement<sup>1</sup> and H.R. 4366, the San Luis Drainage Resolution Act (introduced January 12, 2016). The key elements were identified in a September 1, 2010 letter to Senator Dianne Feinstein from the Department of the Interior (DOI).<sup>2</sup>

### **Comparison of “Key Elements” of a Drainage Solution to the Westlands Drainage Settlement and H.R. 4366:**

In a September 1, 2010, letter from Bureau of Reclamation Commissioner Michael Connor to Senator Dianne Feinstein, the Department of the Interior outlined several key elements that it claimed should be included in a balanced approach to a drainage service solution for the Westlands Water District. In quotations below are excerpts from the DOI letter, including the key elements identified by DOI. After each element, CRS has noted in italics: (1) how the September 15, 2015, settlement agreement—signed by Westlands and the United States—appears to address, or does not address, each element; and (2) how H.R. 4366 appears to address, or does not address, each element in the DOI letter.

Pages 2-5 of the DOI letter provide background and establish parameters for what it describes as a balanced approach to a drainage solution<sup>3</sup>: “The following are the key elements of a long-term legislative drainage strategy that would accomplish those goals and that the Administration would support in legislation:”

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<sup>1</sup> *Agreement Between the United States and Westlands Water District, August 2015*, as filed with the United States District Court for the Eastern District of California (case 1:88-cv-00634-LJO-DLB, document 1001) on September 15, 2015.

<sup>2</sup> Letter from Michael L. Connor, Commissioner of the Bureau of Reclamation, to Senator Dianne Feinstein, September 1, 2010, (Filed with the United States District Court for the Eastern District of California (case 1:88-cv-OWW-DLB, Document #814) on October 1, 2010).

<sup>3</sup> Page 2 of the DOI letter references a “balanced approach that will promote continued sustainable agricultural productivity, lead to improved environmental quality, and increase the reliability of water supply in the Central Valley of California by providing for locally-controlled, timely, and effective irrigation drainage management in the Unit and in areas adjacent to the Unit.”

**“Transfer irrigation drainage responsibility to local control:** Drainage service should be the responsibility of the individual Unit contractor pursuant to a drainage management plan that complies with applicable state and federal standards.”

*1) Paragraph 9(c)(i) of the Westlands drainage settlement would transfer drainage responsibility “in accordance with federal and state law” to the local Westlands Water District. A drainage management plan is not included in the settlement agreement.*

*2) Section 4(2) of H.R. 4366 relieves the Secretary of the Interior of the duty to provide drainage service to the San Luis Unit (SLU) and declares that each irrigation contractor within the SLU shall be responsible for management of drainage within its boundaries.*

**“Require plan and performance measures:** The districts should be required to prepare a comprehensive drainage management plan with measurable environmental objectives, including water quality and specific enforceable performance measures.”

*1) No drainage management plan is included in the settlement agreement, and thus no “measurable environmental objectives,” “water quality,” or “specific enforceable performance measures” are included, other than a general statement under paragraph 9(c)(i) that “Westlands shall agree to be responsible for management of drainage water within Westlands’ boundaries, in accordance with federal and state law, and at its own expense and sole liability.” The agreement also notes that the United States’ obligation to make water available to Westlands is “conditioned on Westlands’ fulfillment of its obligations to manage drainage water within its boundaries.” The settlement agreement does not identify how the U.S. Government, state of California, or other parties will determine whether Westlands is fulfilling or has fulfilled its drainage obligations.<sup>4</sup> Nor does the agreement address procedures to be taken if there is a disagreement among the parties as to whether Westlands is fulfilling or has fulfilled its drainage obligations.*

*2) There appears to be no specific requirement for a drainage plan or identification of enforcement measures in H.R. 4366. However, Section 5 of H.R. 4366 directs that the Westlands Water District “shall assume all legal responsibility for the management of drainage water within its boundaries in accordance with Federal and California law, and in accordance with the Westlands Agreement.”*

**“Require enforcement measures, including the suspension of water deliveries:** Reclamation should be directed to stop delivery of CVP water that would go to parcels of land for which the districts fail to provide acceptable drainage service within a specified timeframe.”

*1) As noted above, Paragraph 9(c)(i) states that CVP water delivery is “conditioned on Westlands’ fulfillment of its obligations to manage drainage water within its boundaries.” No timeline for such is included in the agreement, and no compliance requirements or guidelines are included other than the statement that Westlands shall provide drainage service in compliance with state and federal law.*

*2) There appears to be no specific requirement in H.R. 4366 for suspension of water deliveries as an enforcement mechanism, other than to comply with federal and state law and to implement the terms and conditions of the Westlands Agreement.*

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<sup>4</sup> A related U.S. court filing states that Westlands “will use a mix of measures which will depend on the varying needs of lands within drainage-impaired areas and which will evolve as conditions change. These measures will include elements identified in Reclamation’s drainage plan, such as land retirement, source control through more efficient irrigation practices, and collection and reuse of shallow groundwater, although the specific mix of elements may differ from Reclamation’s plan.” (*Memorandum of Points and Authorities in Support of Joint Motion for Partial Stay*, Case 1:88-cv-00634-LJO-DLB, document 1002-1, filed on Sept. 23, 2015, p. 11.) The settlement agreement itself does not include or specify such actions.

**“Require land retirement:** Westlands Water District should be required to permanently retire a minimum of 200,000 acres of the most drainage impaired lands as part of the required drainage management plan. This is consistent with past plans considered by the District. In addition, it is comparable with the number of acres to be retired under Reclamation's ROD (194,000 acres).”<sup>5</sup>

*1) The settlement agreement does not call for 200,000 acres to be permanently retired. Rather, paragraph 9(e) calls for retirement of 100,000 acres. According to DOI officials, between 35,000 and 40,000 acres (of this 100,000) have already been retired under earlier settlements and some other lands have been temporarily retired, pending resolution of drainage issues.<sup>6</sup> Thus, the settlement agreement calls for roughly half the acreage retirement outlined in the 2007 DOI Record of Decision.*

*2) H.R. 4355 does not specify land retirement; however, Section 3 directs the Secretary to implement the terms and conditions of the Westlands and Northerly District settlement agreements and Section 5 directs that Westlands assume all legal responsibility for drainage within its boundaries.*

**“Contract quantity consistent with land retirement:** Upon development of a plan that will permanently retire 200,000 acres (approximately 30 percent of the agricultural lands in the district), CVP water under long-term contract to Westlands should be reduced to an annual amount of 806,000 acre feet of Project Water for irrigation (which is 70 percent of the amount provided in the existing water service contract) to bring it into balance with the amount of land remaining in production. The legislation should make clear, however, that when less than full contract amounts are available for delivery, the legislation shall not result in Westlands' CVP water supply being reduced by a greater proportion, relative to other south-of-delta CVP contractors, than would have occurred without the legislation, up to 806,000 acre feet. In extremely wet years, nothing in the legislation should prevent Westlands from entering into a contract for additional water on the same terms as other contractors.”

*1) The settlement agreement would not reduce the Westlands contract amount. Rather, under paragraph 9(c)(ii) the full contract amount would remain at 1.193 million acre-feet, with the United States having “exclusive right to the use” of CVP water “made available to Westlands in excess of 895,000 acre-feet.” Under current law, the United States holds water rights for the CVP and essentially has the right under Reclamation law and other laws to use the full contract amount for higher priority purposes under law, including meeting obligations to deliver water to senior water rights contractors, environmental purposes, and other contractors with delivery priority ahead of the Westlands Water District. This provision would give Reclamation “exclusive right” to 298,000 acre-feet in years in which Westlands would be allocated more than an approximate 75% of its contracted water supply—a level that has occurred seven times in the past 25 years.<sup>7</sup>*

*2) H.R. 4355 does not specify a contract quantity consistent with land retirement; however, Section 3 directs the Secretary to implement the terms and conditions of the Westlands and Northerly District settlement agreements and Section 5 directs that Westlands assume all legal responsibility for drainage within its boundaries.*

**“Reduce or relieve contractors' repayment obligations in recognition of increased upfront drainage obligation:** [In] recognition of the districts assuming upfront responsibility for drainage

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<sup>5</sup> “ROD” stands for Record of Decision, which is the endpoint of the environmental impact statement (EIS) review process under the National Environmental Policy Act. Reclamation completed an EIS for Westlands drainage proposals in March, 2007. ([www.usbr.gov/mp/scca\\_new/west\\_sjv/sld/docs/sldfr\\_report/Appendices/AppM-Final.pdf](http://www.usbr.gov/mp/scca_new/west_sjv/sld/docs/sldfr_report/Appendices/AppM-Final.pdf).)

<sup>6</sup> Briefing held by Department of the Interior officials for House and Senate staff on September 21, 2015.

<sup>7</sup> Westlands has received greater than a 75% allocation seven times since 1990: in wet water years 1995-1998; above normal water year 2005; wet water year 2007; and most recently, wet water year 2011. (Source: data provided by the U.S. Dept. of the Interior, Bureau of Reclamation, email communication, November 14, 2014, *Total Annual Pumping at Banks, Jones, and Contra Costa Pumping Plants 1976-2014 (MAF)*.)

management within their orders (rather than repaying the U.S. for its investment), we believe legislation should relieve the contractors of all or a portion of their remaining obligation to repay the cost of existing CVP facilities. It should also address a portion of the treatment costs of the exchange contractors. As you know, the exchange contractors have asserted that they are adversely affected by down-slope subsurface drainage from the Unit. While the U.S. does not agree with that assertion, we do believe that assistance in funding treatment costs for the exchange contractors is appropriate as part of a broader resolution of issues.”

*1) Paragraph 9(c)(iv) would relieve Westlands of “all unpaid capitalized construction costs for the CVP allocated to Westlands as of the date of this Agreement...”, which is estimated at \$375 million. The provision further relieves Westlands of any obligation to repay “any costs incurred by the United States prior to the date of this Agreement for purposes of evaluating, planning, or providing drainage to the San Luis Unit (which heretofore were to be reimbursable), or future costs incurred to provide drainage service to lands outside of Westlands’ boundaries.” In the matter of the exchange contractors, Westlands contends that no water leaves its boundaries; however, as noted by the Administration, above, other nearby districts have disagreed and filed lawsuits accordingly. The settlement agreement provides no assistance in funding treatment costs for the exchange contractors. Further, this provision would absolve Westlands of any duty to address drainage issues outside Westlands’ boundaries. Thus, the settlement agreement appears to leave the United States responsible should it be discovered at a future point that contaminated water does leave Westlands’ boundaries and affects neighboring lands.*

*2) Section 7 of H.R. 4366 suspends Westlands repayment obligation as set forth in the settlement agreement and once executed, the repayment contract shall include no repayment obligation (as set forth in the agreement).*

**“Provide for longer term contract and authorize accelerated repayment:** In recognition of the districts taking on the upfront responsibility for drainage service, we could agree to the conversion of the existing water service contracts with the Unit contractors to repayment contracts, provided that the contract quantity is re-evaluated upon completion of the Bay-Delta Conservation Plan, and provided further that the non-financial terms of the contract remain subject to renewal in the future. Under the Central Valley Project Improvement Act (CVPIA), water service and repayment contracts are subject to renewal every 25 years. We could support amending the CVPIA to provide for a longer term for the converted repayment contracts of the San Luis Unit contractors. The districts should also be given the opportunity to accelerate the repayment of any capital obligation to the U.S. under those contracts without penalty. The contract with Westlands Water District should be for the reduced water quantity, as discussed above. Contracts with the other Unit districts should be for the full quantity of water for which they presently contract, unless they retire a portion of their lands.”

*1) The settlement agreement provides for conversion to a longer term contract as well as accelerated repayment; however, it does not include the provisos that the “contract quantity is re-evaluated upon completion of the Bay-Delta Conservation Plan” or that the “non-financial terms of the contract remain subject to renewal in the future.”*

*2) Section 6(a) directs the Secretary to convert Westlands existing long-term or interim water service ((9)(e)contract) to a repayment contract ((9)(d) contract) for irrigation and municipal and industrial purposes ((9)(c) contract). H.R. 4366 also does not mention the BDCP or CVPIA renewal limit; however, again, Section 3 of H.R. 4366 directs the Secretary to implement the terms and conditions of the Westlands and Northerly District settlement agreements.*

**“Acknowledge potential impact of the Bay Delta Conservation Plan (BDCP):** Legislation that authorizes a longer term contract for Westlands must also recognize potential changes to water supply reliability and environmental requirements that may result from completion of the BDCP.”

1) *The settlement agreement does not explicitly mention BDCP; however, it does include a provision stating that nothing shall change allocation provisions, and includes shortage language similar to the existing interim contract, which provides for shortage allocations based on actions of the Secretary to meet legal obligations.*

2) *H.R. 4366 makes no mention of the BDCP, but includes similar (but not identical) shortage allocation language to the existing interim contract and the Westlands settlement agreement.*

**“Clear and comprehensive shortage provision:** The legislation must also make clear that there is no liability for the U.S. if the full amount of contracted water cannot be made available. Further, the legislation should state that the districts will not have a greater certainty to CVP water deliveries than they would have had previously. Without such a provision other districts outside the Unit could be adversely affected.”

1) *Paragraph 9(c)(vi) includes shortage condition language similar to, but not identical, to the 2007 interim contract, which has been renewed several times. Following is the language in the settlement agreement (the language from the existing interim contract is provided in footnote 7): “If there is a condition of shortage in the amount of water available for delivery to Westlands because of the exercise of the Secretary’s discretion in allocating water, errors in physical operations of the Project, drought, hydrologic variability, other physical causes beyond the control of the Secretary, or actions taken by the Secretary to meet legal obligations, no liability shall accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom.”<sup>8</sup> The distinction between “beyond the control of the Secretary” and “beyond the control of the Contracting Officer” may affect what circumstances allow for implementation of the shortage provision.*

2) *Section 6(b)(3) of H.R. 4366 includes a limitation on liability of the United States arising from shortages similar to the shortage provision in contracts and the Westlands agreement, yet slightly different.<sup>9</sup> Section 6(b)(2) notes that the contract conversion “shall not afford Westlands Water District greater or lesser rights to an annual allocation of project water...”*

**“End to the litigation:** Final resolution of this matter must also include an end to litigation. We believe that any legislation must require that the Unit contractors and exchange contractors waive any past, current, or future drainage claims against the U.S. and dismiss all pending litigation related to Unit drainage if they seek to take advantage of the financial and other benefits offered by the legislation.”

1) *Settlement agreement Paragraphs 9(a) and 9(b) call for Westlands and the United States to work together to end the remaining pending drainage lawsuits, the consolidated cases of Firebaugh Canal Co. v. United States, No. 1:88-cv-00634 (E.D. Cal.), and Sumner Peck Ranch, Inc. v. Bureau of Reclamation, No. 1:91-cv-00048 (E.D. Cal.), as well as Etchegoinberry v. United States, No. 1:11-cv-00564 (Fed. Cl.). In Etchegoinberry, Westlands agrees to indemnify the United States against takings liability and to “use its best efforts to obtain a release, waiver and abandonment of all past, present and future claims of each landowner within its service area against the United States arising from the alleged failure by the United*

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<sup>8</sup> The existing interim contract shortage provision (Article 12(b)) reads: “If there is a Condition of Shortage because of errors in physical operations of the Project, drought, other physical causes beyond the control of the Contracting Officer or actions taken by the Contracting Officer to meet legal obligations then, except as provided in subdivision (a) of Article 18 of this Contract, no liability shall accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom.” ([http://www.usbr.gov/mp/cvpia/3404c/lt\\_contracts/2007\\_int\\_cts/2007\\_interim\\_westlands\\_dft.pdf](http://www.usbr.gov/mp/cvpia/3404c/lt_contracts/2007_int_cts/2007_interim_westlands_dft.pdf).)

<sup>9</sup> The limitation on liability found in Section 6(b)(3) of H.R. 4366 states that no liability shall accrue against the United States from a condition of shortage caused by “(A) errors in physical operations of the Project; (B) physical causes beyond the control of the Contracting Officer, including drought; or (C) actions taken by the Contracting Officer to meet legal obligations.”

*States to provide drainage service.” In Firebaugh, Westlands and the United States will petition the district court to have the judgment in that case vacated. Also, Westlands and the United States will stipulate to the dismissal of the present lawsuit between the two parties.<sup>10</sup>*

*2) H.R. 4366 includes no specific mention of the cases above; however, Section 8(c) notes that upon transfer, Westlands will hold the United States harmless for “any and all claims, cost, damages, and judgments of any kind arising out of any act, omission, or occurrence relating to the transferred facilities, except for such claims, costs, damages arising from acts of negligence committed by the United States or by its employees, agents, or contractors, prior to the date of title transfer, for which the United States is found liable under the Federal Tort Claims Act.”*

**“Renewable energy incentives:** It is our understanding that Westlands Water District may be interested in developing renewable energy projects on its retired lands. We strongly support that initiative, and therefore would like to explore with the District opportunities to move such projects forward.”

*1) Paragraph 9(e) includes “renewable energy projects” in the purposes for which retired lands shall be used; however, there appears to be no other mention of moving such projects forward.*

*2) H.R. 4366 includes no language on renewable energy incentives; however, Section 3 directs that the Secretary implement the settlement.*

**“Title transfer:** If requested by the districts, we would support authorization to transfer title of federally owned facilities within the Unit that are determined by the Secretary to be appropriate for transfer. These are facilities that generally serve only one district.”

*1) Paragraph 9(f) directs the Secretary to transfer to Westlands “all right, title and interest, without warranties” in facilities and real property outlined in Attachment B.*

*2) Section 8 of H.R. 4366 directs the Secretary to transfer title to the San Luis canal system, excluding the main canal, but including internal distribution systems, pumping plants, and related structures and equipment. Section 8(a)(2) includes transfer of Mendota Pool diversion facilities operated by Westlands, and Section 8(a)(3) includes transfer of the Pleasant Valley system. Section 8(a)4-6 include transfer of drainage systems and Reclamation field offices. Section 8(a)(7) includes transfer of “real property interests held by the United States in lands underlying or otherwise associated with the facilities and equipment listed in this subsection.” Lastly, Section 8(d) requires compliance with federal and state law before transfers may occur. (CRS has not compared this list with facilities and real property outlined in Attachment B of the settlement agreement.)*

As shown above, the settlement agreement and H.R. 4366 depart from the “key elements” in many ways. In some cases, certain key elements are not included in the settlement agreement or the legislation; in others, the agreement addresses only certain aspects of key elements. Comparison of the key elements with the proposed settlement agreement and H.R. 4366 raises several policy and implementation questions, including implications of the agreement for other CVP contractors who might otherwise benefit from a reduced contract supply by Westlands, cost to the federal government for the agreement versus costs avoided,<sup>11</sup> and future liability for the United States for drainage damages if any were to occur

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<sup>10</sup> Sarah Herman (sherman@crs.loc.gov), Legislative Attorney in the CRS American Law Division, provided the comparison of the settlement agreement to this key element, but did not provide analysis of H.R. 4366.

<sup>11</sup> For example, although the federal estimate for a drainage solution is well over \$2 billion, under federal Reclamation law much of the cost would eventually be reimbursed to the federal government by Westlands contractors, assuming an “ability to pay.”

outside the Westlands District boundaries. Further discussion of these questions, however, is outside the scope of this memorandum.

I hope this memorandum satisfies your request. Please contact me at [REDACTED] if you have further questions.